SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: TRIAL TERM PART 17

- X

REYNA ARROYO,

Petitioner,

- against -

NYC BOARD/DEPT. OF EDUCATION,

Respondent.

- X

Index No. 100741-2018

November 27, 2018
60 Centre Street
New York, New York 10007

B E F O R E: THE HONORABLE SHLOMO S. HAGLER, Justice

A P P E A R A N C E S:

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Petitioner Pro Se
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NEW YORK CITY LAW DEPARTMENT
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BY: ALANA R. MILDNER, ESQ.

ALSO PRESENT: Mariella Torres,
Official Spanish Interpreter

Terry-Ann Volberg, CSR, CRR
Official Court Reporter

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THE COURT: Good morning. Welcome. I am Judge Hagler.

I believe we have a Spanish interpreter here.

THE INTERPRETER: Yes.

THE COURT: Please state your name.

THE INTERPRETER: Mariella Torres, Court Interpreter, Spanish.

THE COURT: Thank you so much for helping out today.

THE INTERPRETER: You're welcome.

THE COURT: Your name, please.

MS. R. ARROYO: Reyna Arroyo.

THE COURT: Ms. Arroyo, are you ready to proceed today?

MS. R. ARROYO: Yes, sir, I am ready.

THE COURT: Counsel, please state your name.

MS. MILDNER: Alana Mildner, New York City Law Department.

THE COURT: Are you ready to proceed today?

MS. MILDNER: Yes, your Honor.

THE COURT: I have read the papers. This is an Article 75 proceeding wherein Ms. Arroyo --

THE INTERPRETER: I am sorry, sir, I lost track.

THE COURT: This is an Article 75 proceeding

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wherein Ms. Arroyo is seeking to vacate the determination by the arbitrator. The arbitrator found the specifications by the respondent to be mainly sustained. The penalty unfortunately for Ms. Arroyo was termination.

Ms. Arroyo is challenging both the determination in the specifications, the findings of fact with regard to the specifications, and, more importantly, the penalty which was termination.

I have received --

THE INTERPRETER: I'm having a hard time hearing you.

THE COURT: I will speak louder.

I have received the papers in this case, and now we are ready to proceed.

Ms. Arroyo, do you want to tell me why I should vacate the arbitrator's determination both as to the findings and the penalty?

Whenever you are ready, Ms. Arroyo.

MS. R. ARROYO: I have here an oral argument which I would like to read. If you will allow me to, I have my friend and my son. Perhaps one of them could read this.

THE COURT: She wants her son to read it?

THE INTERPRETER: Yes, or her friend, in the

back.

THE COURT: I prefer that Ms. Arroyo speak for herself, I think.

THE INTERPRETER: It's written in English. The document she's holding is written in English.

THE COURT: I assume if it's written in English you can read it.

MS. R. ARROYO: Okay. I may read it.

THE COURT: I will allow you some leeway. Normally I don't allow prepared written speeches, but since you are not represented by counsel, I will give you a little leeway.

The reason that I have oral argument is not merely to reread your papers. I have read your papers. I read it. I know what your papers say. I know what the respondent's papers say. I do my homework. I read the determination by the arbitrator. I am ready to proceed.

I want you to really highlight some of your main arguments and persuade me why I should vacate the arbitrator's determination. If you want to read, I will allow you to read because, as I said earlier, I will give you a lot of leeway because you are not represented by counsel. This is important, an important decision for you, and I will accommodate you

as much as I can.

MS. R. ARROYO: So then I shouldn't read it, right?

THE COURT: Sorry? I didn't say that. What I said was, I prefer if you highlight the major points. If you would like to read, I will accommodate that. I am giving you a choice. I am not restricting you.

I want you to have your opportunity here in court, it's going to be one time, and I want you to make the most of that one time.

MS. R. ARROYO: Okay. I am going to read it.

Thank you, your Honor, for this opportunity to address the unjust penalty handed down at my 3020-a by Arbitrator Lisa Pollack.

The basis of the petition is essentially three arguments. The first is a procedural argument that the New York City Department of Education --

THE COURT: You have to say it slower and you have to pronounce it a little better. I understand what you are saying, but I don't have to type it.

MS. R. ARROYO: New York City Department of Education circumvented and skirted procedural safeguards that are in place before a teacher is given any penalty.

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Second is the apparent --

THE COURT: You are doing it again.

MS. R. ARROYO: -- is the apparent improper motivations of the Department inferred from --

THE INTERPRETER: Inferred.

THE COURT: Let's stop for a second.

Ms. Arroyo, what you are saying is incomprehensible. I can't understand you. You are saying very big words that you are having difficulty enunciating, and it's actually blurring your arguments. The reporter can't take it down. I can't understand it as well. I understand the first argument, but the second one, I didn't hear a word you said.

I normally don't do this. If you want your son to read it, I will allow your son to read it if you want to give me the highlights, but we are not making progress this way because I don't understand it.

Counsel.

MS. MILDNER: Your Honor, I would ask that somebody else read it, the interpreter, perhaps, or that Ms. Arroyo submit it.

THE COURT: Do you want the interpreter to read it? How is that? Would you like to do that?

THE INTERPRETER: Okay.

THE COURT: This is not a bad idea.

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THE INTERPRETER: Second is the apparent improper motivations of the Department inferred from inconsistencies, implausibilities, and contradictions in the record.

Third is objective data which shows that I am actually an effective teacher.

The procedural errors are rampant in this case starting with the violation of Education Law 3020-a(2)(a) with the omission of an Executive Session and vote on probable cause by the Panel For Educational Policy. Arbitrator Pollack was appointed to hear this case pursuant to ED Law 3020-a, but the Department never brought my charges to an Executive Session for a vote on probable cause.

The Department insists that the Department gave the Chancellor all the duties of the school board. Okay, then the Chancellor should have held an Executive Session and vote on Probable Cause as mandated by the law.

She, Former Chancellor Carmen Farina, never did this. Thus, Arbitrator Pollack had no subject-matter jurisdiction to make any decision in my case.

Judge Desmond Green ruled in the Article 75 Petition brought by Rosalie Cardinale in Richmond

County Supreme Court, Index Number 85165/2017 on March 9, 2018, that "The Court of Appeals speaking on the necessity of teachers tenure stated: Tenure is a legislative expression of a firm public policy determination that the interests of the public in the education of our youth can best be served by a system designed to foster academic freedom in our schools and to protect competent teachers from the abuses they might be subjected to if they could be dismissed at the whim of their supervisors. In order to effectuate these convergent purposes, it is necessary to construe the tenure system broadly in favor of the teacher, and to strictly police procedures which might result in the corruption of that system by the manipulation of the requirements for tenure." Ricca v. Board of Education, 47 NY2d 385, 391 (1979).

Judge Green added, "The DOE's failure to make a finding of probable cause and adhere to the procedural protections guaranteed to petitioner in Education Law 3020-a violates petitioner's due process rights and violates New York's strong public policy protecting the integrity of the tenure system." Decision, p. 10.

"This Court finds the DOE's interpretation of the statutory framework, even had they presented

evidence permitting such delegations, runs afoul of the clear legislative intent. The concentration of all disciplinary authority into the hands of a single local administrator creates the very 'arbitrator imposition of formal decision' the legislature sought to prevent when enacted Education Law 3020-a. (Holt v. Board of Ed of Webutuck Central School Dist., 52 NY2d 625, 632, [1981]. (Decision, p. 11-12)

Judge Green then granted Ms. Cardinale's Verified Petition and vacated her termination. I submitted the exact same Motion to Dismiss For Lack of Subject-Matter Jurisdiction in my hearing, your Honor, and, therefore, I ask you to do the same.

It is clear from the record that the circumstances and facts presented in this matter did not deserve any kind of penalty. Arbitrator Lisa Pollack, Esq. was far from neutral in the 3020-a arbitration. She neglected to address the fact that my prior record of teaching for 19 years was exemplary, and I had never been disciplined before.

Her decision to terminate my employment is based solely on the nonfinal opinions of the Principal and Assistant Principal in and observations. What is competency? To Arbitrator Pollack, who willingly and recklessly refused to honor my tenured status,

incompetency is anything that the principal said it was. She terminated me on hearsay alone which is not permitted in these proceedings.

The Department did not bring in any grades of students or outcomes of student performance. Thus, there is no evidence that I could not teach my students. In fact, my student witnesses testified that I made a very big impact on their learning. Pollack was not interested. She was predisposed to terminate me from the first day of hearings. I had no voice.

Danielson mandates that an observation is a minimum of 15 minutes. What can an administrator see in 15 minutes of a lesson? Very little. As I wrote in my Verified Petition, observation reports are only opinions. There are no facts or data in observation reports. This was the ruling in the Kings County case called Elentuck v. Green cited in my petition.

Arbitrator Pollack ignored the mandates for "just cause, strict scrutiny as a standard of review, and progressive discipline," and she also showed no concern that the Department did not reach the high standard for a preponderance of the evidence in this matter.

One more point I would like to make here today. I was charged with 11 observations. Assuming

each observation lasted 20 minutes as an average, over the three charged years I was assessed for 120 minutes by the administrators who wanted to terminate my job, but three years of teaching is more than 222,000 minutes. Therefore, your Honor, Arbitrator Pollack terminated my employment because of the hearsay, nonfinal opinions from 120 minutes. Does this make sense? No, it does not.

Arbitrator Pollack used only the biased opinions and hearsay statements of the administrators over the straightforward factual information given in testimony by me and my witnesses. This is unconscionable and cause to vacate the baseless penalty in favor of a less extreme penalty or none at all.

Thank you, your Honor.

THE COURT: Okay. Thank you.

Ms. Arroyo also handed me a written version of the oral argument which I read. I listened to it. I believe counsel received a copy as well, correct?

MS. MILDNER: Yes, your Honor.

THE COURT: Ms. Arroyo, have you concluded your argument?

MS. R. ARROYO: I said everything here.

THE COURT: Okay.

Counsel, opposition, please.

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MS. MILDNER: Your Honor, Ms. Arroyo has not shown that Education Law 3020-a was violated in any way at her hearing.

Regarding the procedural argument, I believe it was Exhibits 5 and 6 to my answer --

THE INTERPRETER: Could she go slower for me?

THE COURT: Speak a little slower. It has to be interpreted as well.

MS. MILDNER: I believe it was Exhibits 5 and 6 to respondent's answer which contained two delegation memoranda. One of those memorandum was delegating authority from the Chancellor to the Community School Superintendent, Ms. Nunez, the other memorandum --

THE INTERPRETER: I can't keep up with here.

THE COURT: You really have to slow down a little.

THE INTERPRETER: Can I have the last portion read back?

THE COURT: Please.

(The testimony as requested was read by the reporter.)

MS. MILDNER: -- was delegating authority from the Community Superintendent to principals. So

here Principal Timothy Sigerson did have the authority to bring charges.

Addressing any arguments regarding any sort of improper motivation, petitioner has not demonstrated that there was any individual who was out to get petitioner. There were five administrators who testified at the hearing, two principals, two assistant principals, and a field supervisor from the ATR Reserve, and all of them testified consistently regarding Ms. Arroyo's classroom performance.

Although Ms. Arroyo states that Arbitrator Pollack wanted to terminate petitioner from the first day of the hearing, there is nothing in the record to indicate any bias on the part of Arbitrator Pollack nor has petitioner pointed to anything that would show that Hearing Officer Pollack administered the hearing in any way other than a fair way.

Then regarding petitioner's third point, under the evaluation system that the Department of Education uses, informal observations can be a minimum of 15 minutes, and depending on the option that a teacher chooses, teachers are observed six times per year. So there is nothing that was done in observing Ms. Arroyo that was against state law or the procedures of the Department of Education.

Moreover, the penalty does not shock the conscience. Ms. Arroyo engaged in a pattern of ineffective instruction over the course of three school years. Additionally, upon being provided with professional development opportunity, Ms. Arroyo's teaching failed to improve to the level that would be necessary for her to be an effective chemistry teacher. Therefore, the penalty of termination is appropriate.

I have nothing else, your Honor, unless the Court has questions.

THE COURT: Ms. Arroyo, do you want to say anything else as the last word? You get reply. Do you want to say anything else in reply?

MS. R. ARROYO: Yes.

The three years of teaching that I had, it was the same person who observed me 15 minutes. That person would go in, would go out. She didn't know what happened before, what took place after those 15 minutes, the results of my students. At the end of the year my students' end results were good including that they passed the regents exams. That means that somebody was teaching because regents -- I did not grade the regents, somebody else graded the regents.

THE COURT: Have you completed your presentation?

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MS. R. ARROYO: Yes.

THE COURT: Thank you.

Stay here, please. The parties have been waiting for a decision on this matter. I am going to render a decision now.

Let's set forth the standard by which the Court decides these type of cases. This is a proceeding brought under Article 75 of the CPLR. There are narrow grounds to vacating an arbitrator's award.

Since the arbitration was mandatory, it also implicates due process requirements under Article 78 of the CPLR which provides a secondary layer of protection in that the award cannot be arbitrary or capricious or irrational under the circumstances. The Court must take into consideration the penalty by viewing it as whether it is shocking to the conscience.

Petitioner essentially has three arguments. The first one is a procedural argument. Essentially petitioner argues as she did before the arbitrator --

THE INTERPRETER: That she?

THE COURT: The petitioner argues as she did before the arbitrator that the principal did not have authority to propound charges, specifications under Education Law 3020-a. The arbitrator denied it indicating that Educational Law Section 2590-h provided

for delegation by the Chancellor to the district superintendent who then delegated authority to the local school principals. In the record counsel indicated such delegation memoranda was presented to both the arbitrator as well as this Court that provides for the requisite delegation of duties and responsibilities from the Chancellor, to the superintendents, to the local school principal.

I have read the decision and order of Justice Desmond Green from Supreme Court County of Richmond which was dated March 29, 2018. Justice Green, for one, did not indicate in the decision whether or not the requisite memorandum was attached to the petition or actually the answer to the petition which would satisfy Educational Law requisites. Moreover, there's been countless decisions within the First Department, I am not familiar with decisions of the Second Department, that are contrary to the determination --

THE INTERPRETER: That are what, sir?

THE COURT: -- that are contrary to the determination of Justice Green sitting in the Second Department in Richmond County. My recollection is that I believe there's at least one Appellate Division decision that has reviewed that issue in the First Department. It was one of my decisions that was

affirmed wherein I ruled that there can be delegation of authority from the Chancellor to the superintendent directly to the local school principals. I can't remember the name of the decision. They affirmed my decision. There are many of my colleagues here in New York County that have ruled in that manner. That issue is no longer a disputed issue. When I first started doing these Article 75s about four or five years ago there were really no decisions on point. Now there have been a multitude of decisions all concurring that such duties and responsibilities can be delegated by the Chancellor.

Let's move on to the second argument of Ms. Arroyo. Essentially the second argument challenges the findings of the arbitrator. The arbitrator in a lengthy decision reviewed the witnesses credibility of both petitioner's witnesses of which there were many, I believe six or seven, and five witnesses from the respondent. The arbitrator reviewed and discussed each of the respective witnesses, and found that petitioner's witnesses were testifying truthfully, but really had no ability to gauge the competency of Ms. Arroyo's pedagogy. In contrast, the arbitrator found that the respondent's witnesses were properly trained, did not exhibit or evince any bias towards Ms. Arroyo,

citing an example wherein others that were similarly situated were found to be effective and competent teachers.

The case law is very clear that this Court, even if it wished to do so, cannot substitute its judgment, and review and change credibility findings of an arbitrator.

Ms. Arroyo in her petition directly challenges the arbitrator's ability to be impartial, and states that the arbitrator had bias towards her. The standard to show bias is a very high one. The petitioner fails to do so presenting no evidence of bias other than --

THE INTERPRETER: I would need the last portion read.

THE COURT: Read it back.

(The testimony as requested was read by the reporter.)

THE COURT: -- other than a determination that terminates her employment. The very arbitration decision which is negative and does not support your position is insufficient alone to demonstrate bias. In other words, the mere fact that the arbitrator ruled against you does not give rise to an allegation of bias.

I just want to review the specifications, the charges against Ms. Arroyo. They reflect three different years, 2014 to '15, 2015 to 2016, 2016 to 2017. They span a period of November 12, 2014, 2015, 2016, and last, May 22nd, 2017.

There are 11 dates wherein the respondent had charged the petitioner with failing to properly, adequately, and effectively plan and execute lessons on those dates. We are not talking about one isolated incident, we are not talking about two, we are not talking about one year or even two years, we are talking about three years of observations spread over 11 different dates, and three years of teaching that was reviewed and observed.

That brings me to the third point of Ms. Arroyo, that one cannot properly judge an individual with 15 minutes of observations. This is hardly 15 minutes. This is a three year span of time. Therefore, this Court cannot, even if it wished, change the factual determinations by the arbitrator, and the credibility findings as to the level of competence during that lengthy period of time.

Let's move on to the real issue. The petitioner strenuously argues that the penalty shocks the conscience and should be vacated.

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I just want to read a portion of the arbitration award by the arbitrator with regard to the penalty. I'm going to read the paragraph just above penalty because it gives background. "Having found that the Department has proven respondent's incompetency, I must now look at remediation efforts. As set forth above, the evidence introduced documented professional development meetings, training, action plans, some coaching offers, and feedback and suggestions from numerous formal and informal observation. As of 2016 through 2017, respondent had not improved in any appreciable way. All of these admonitions and opportunities were designed to improve respondent's teaching performance. The respondent's own testimony clearly established that she knew and understood that the department was concerned with her pedagogy, and that they wanted her to follow their suggestions to better her pedagogy. It is also clear that respondent was aware of the consequences if she did not improve her pedagogy."

"Despite all of the efforts to warn her that she was not actually teaching effectively, she persisted in ignoring administration and supervisors," it should be suggestions, the typo says suggests, "and continued in teaching lessons improperly."

I'm going to skip to the last line, sorry, the last paragraph on page 46. "However, I have reviewed the observations and find the same pedagogical weaknesses again and again. I find that the respondent adamantly resisted any suggestion that her practice needed improvement. I find that the department made significant efforts to provide respondent with opportunities for professional development, and I find the respondent consistently and adamantly resisted those efforts.

While respondent argues there is no progressive discipline here, she was made aware on several occasions in the past three years that discharge was a possibility if she failed to improve her pedagogy.

I believe on the evidence before me that there is no prospect that respondent could improve her performance to an effective level if she is offered further remediation. She has not improved over three years despite being under a TIP all three years. Her testimony showed that she does not believe that there is any problem to her pedagogy, and there is no indication that she will follow instructions under the past TIPs.

If she were going to change, she would have

done so when she was put on notice that she was vulnerable when she received TIP, and she would have engaged in substantive discussions with administrators in post-observation conferences. She would have submitted lesson plans for review with the administrators which she did not.

Termination is not a disproportionate penalty when measured against the seriousness and harm to the children. I do not believe that a fine or suspension would change her. Accordingly, I determine that the proper penalty in this case is termination.

The arbitrator considered the specifications, the observations, the opportunity and warning that petitioner had to improve her pedagogy. She was given three year's worth of developmental training. The petitioner, according to the arbitrator, did not improve in any appreciable manner. Moreover, the arbitrator found that remediation, further training, would not be successful as the petitioner believes adamantly that she needs no further improvement in her pedagogy.

The arbitrator found that the past performance showed that she will not remediate and had not made any effort to do so not even providing lesson plans for the administrators to review.

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Given that petitioner had ample opportunity for improvement over the course of three years, that petitioner has not improved in any appreciable manner, and that remediation would not be effective given her adamant rejection that she needs improvement in the areas of pedagogy, the arbitrator's determination and penalty of termination does not shock one's conscience, and was reasonable and rational under the circumstances. Therefore, this Court denies the petition and dismisses the proceeding.

Have a good day.

Good luck in the future.

MS. MILDNER: Thank you, your Honor.

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C E R T I F I C A T E

I, Terry-Ann Volberg, C.S.R., an official court reporter of the State of New York, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes.

Terry-Ann Volberg, CSR, CRR
Official Court Reporter